No. 90-224

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IN THE

Supreme Court of the United States

October Term, 1990

JON F. BARNES, HOMER L. GIBSON, JEAN Z. GIPSON, CLARENCE P. KENNEDY, NORMAN J. MUTH, FEBO C. SPAGNUOLO,
Petitioners,

vs.

GENCORP INC.,
Respondent.

RICHARD S. NOVITSKY,
Petitioner,

vs.

DIVERSITECH GENERAL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.1

Respondent GenCorp Inc. is a publicly held corporation with no parent corporations. Stock of GenCorp Inc. is traded on the New York Stock Exchange. GenCorp Inc. has the following subsidiaries and affiliates, exclusive of wholly owned subsidiaries:

Metallurgical Industries, Inc., which is publicly held;

GKK Automotive, Inc., Ltd., which is a joint venture with Kurashiki Kako (Mazda).

Respondent DiversiTech General, Inc., now known as "GenCorp Polymer Products," was a wholly owned subsidiary of GenCorp Inc. until December 27, 1988, at which time DiversiTech General, Inc. was merged into GenCorp Inc. Respondent DiversiTech General, Inc. had no subsidiaries other than wholly owned subsidiaries.

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STATEMENT OF THE CASE

As they have throughout this litigation, Petitioners ignore the undisputed, individualized facts that led GenCorp and DiversiTech to select them for layoff in an economically mandated reduction-in-force. Instead, they merely rely on broad brush, lifeless statistics—carefully packaged and canted to reach the conclusion they desire. This Court, as did the courts below, must look behind the screen of statistics in order to fully appreciate why summary judgment is appropriate.

Throughout the 1980s American companies and their employees were bedeviled by corporate "raiders." GenCorp's turn came in March, 1987. As a defense to an unsolicited tender offer, GenCorp instituted a massive stock repurchase program at a cost of $1.4 billion. This repurchase program was primarily financed by the sale of two large GenCorp subsidiaries—General Tire, Inc., a tire manufacturer, and RKO Bottling, a soft drink bottler.

GenCorp Research. Prior to the attempted hostile takeover, GenCorp maintained a Research Division in Akron, Ohio where the "GenCorp" Petitioners were employed. The Research Division conducted research in three areas: tire technology; projects associated with GenCorp's automotive and polymer-based products; and exploratory and support research. The Research Division employed 154 persons in a variety of professional, technical, managerial and clerical positions.

With the divestment of General Tire, GenCorp determined that not all existing Research positions could be justified. A smaller company needed a smaller, more focused research laboratory. For instance, since GenCorp was no longer involved in tire manufacturing, there was no longer a need for GenCorp to do tire research.

In deciding which positions to eliminate, each job at the Research Division was examined individually. Those no longer necessary to GenCorp's ongoing business were eliminated, and the incumbent employee was laid off. In all, 38 persons—ranging in age from 22 to 62—were laid off as a result of the restructuring. None of these positions have been recreated or filled since then.

The specific facts surrounding the discharge of each GenCorp Petitioner follows:

1. Jon F. Barnes

Jon F. Barnes [Date of Birth (DOB): 12-23-38] was employed as a non-technical Research Technician in the Polymer Structure Section. His actual duties consisted of laboratory characterization testing of polymers under the general supervision of technical personnel.

Following the divestment of General Tire, management determined that only one non-technical employee was necessary to continue the reduced workload in polymer characterization services. Accordingly, management reviewed the knowledge, skills and abilities of the non-technical employees involved in polymer characterization—Barnes, K.L. Hall [DOB: 4-27-61]; A.J. Kirschner [DOB: 5-2-47] and J.W. Lea [DOB: 9-14-32].

Mr. Lea, then age 54, was selected for the sole remaining non-technical job because his knowledge, skills and abilities were deemed superior to those of both Barnes and Ms. Kirschner. In fact, Mr. Lea held the highest ranking non-technical classification in the lab and he had extensive experience in light of his 33 years

of employment.[1] (It should also be noted that while age was not a factor in the decision to retain Mr. Lea, he was the *oldest* of the four.)

2. Homer L. Gibson

Homer L. Gibson [DOB: 5-26-31] was employed as one of three Research Machinists in the Machine Shop. As a Research Machinist, Gibson provided machine services and support for the activities of the Research scientists. He was also available to assist in plant maintenance, if required.

Following the restructuring, management determined only one Research Machinist was necessary, given the reduction in research activities, with additional duties to be performed as needed by the Department Supervisor, W.W. Miller. Again, management reviewed the knowledge, skills and abilities of the three Research Machinists employed in the Machine Shop—Gibson, R.G. Boyd [DOB: 2-9-33]; and G.E. Dodson [DOB: 11-23-30]—relative to the requirements of the sole remaining position.

Mr. Boyd, then age 54, was selected because his knowledge, skills and abilities were deemed superior to those of Messrs. Gibson and Dodson. Mr. Boyd's performance reviews were consistently higher than those of the other two Research Machinists and he was also considered the best machinist by the Department Supervisor, W.W. Miller.

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[1] Since Mr. Hall was receiving his Bachelor of Science degree in one month, in June, 1987, and would therefore become a technical, as opposed to a non-technical, employee, he was also retained.

3. Jean Z. Gipson

Jean Z. Gipson [DOB: 9-22-29] was one of two library technicians in the Technical Information Center at the Research Division. As a Library Technician, she provided information resources to technical and professional personnel.

Following the restructuring, management determined that the Technical Information Center needed only one Library Technician (rather than two) and that the scope of the Library Technician function would be expanded to include the provision of additional technical services. Accordingly, management reviewed the knowledge, skills and abilities of the two incumbent Library Technicians—Gipson and Ms. Norma K. Smith [DOB: 3-1-36]—relative to the requirements of the remaining position. Management decided to retain Ms. Smith, then age 51, because she possessed a Bachelor of Science degree in chemistry and, prior to holding the job of Library Technician, she had been a chemist for GenCorp. Ms. Gipson, on the other hand, possessed no college degree and her prior experience had been limited to clerical and operative positions.

4. Clarence P. Kennedy

Clarence P. Kennedy [DOB: 4-17-28] was employed as a non-technical Research Assistant to a Group Leader, P.T. Suman, and both were involved with analyzing and synthesizing rubber compounds, primarily for use as tire rubber. Mr. Kennedy's actual duties consisted of performing laboratory testing of rubber compounds under Mr. Suman's supervision.

Following the restructuring, management determined that only one person was required to do the limited amount of rubber compound research which remained following the divestment of General Tire. Accordingly, management reviewed the knowledge, skills and abilities of the two employees involved, Kennedy and his supervisor, P.T. Suman [DOB: 10-8-37].

Mr. Suman, then age 49, was retained because his knowledge, skills and abilities were deemed superior to those of Mr. Kennedy. Mr. Suman possessed a Bachelor of Science degree in chemistry and had performed all technical functions related to the rubber compound research. In contrast, Mr. Kennedy possessed no college degree and his prior experience had been limited to non-technical support.

5. Norman J. Muth

Norman J. Muth [DOB: 2-13-31] was employed as Supervisor for Research Center Services. He supervised four clerical employees and had operational responsibility for the clerical and mechanical storeroom; shipping and receiving; and mail, custodial, lawn and waste services. He reported to W.L. Kollar, formerly Manager, Research Center Administration.

Following the restructuring, management determined that Mr. Muth's staff of four clerical employees would be reduced to two, who would report directly to the Manager for Research Center Administration. Mr. Muth's position therefore became redundant once no other staff members reported to him.

6. Febo C. Spagnuolo

Febo C. Spagnuolo [DOB: 11-23-28] was employed as a non-professional Laboratory Supervisor in the physical testing area. As such, he was directly responsible for the physical testing of tires and various other rubber products.

Following the restructuring, management determined that an intermediate level of supervision in the physical testing lab could not be justified in view of the limited amount of physical testing which would remain following the divestment of General Tire. Accordingly, management eliminated the position of Laboratory Supervisor, held by Mr. Spagnuolo, as well as four non-technical Research Assistant positions, all of which were in the Polymer Physics and Physical Testing Section. Any remaining physical testing following the divestment of General Tire would be supervised or performed on an *ad hoc* basis by the professional Research Scientists and Research Physicists who remain in the Section, as well as by the Section Head, Donald R. Wiff.

As can be seen from the reasons for each decision, the Research Division management made a careful job-by-job analysis of each position, eliminating only those which were no longer necessary to a smaller GenCorp following the takeover attempt. In no case did GenCorp make cuts based on age or seniority; rather, each decision was made according to GenCorp's expected future research needs and management's assessment of how the incumbent employees fitted those needs. Indeed, in some instances (*e.g.*, Barnes) the older employee was retained. In other instances the age differences were small. (For example, the research machinist who was retained was less than two years younger than Petitioner Gibson and

had virtually the same seniority.) In other cases (*e.g.*, Muth and Spagnuolo) the Petitioner was the only person to hold a particular job classification, which was eliminated.

Diversitech General, Inc. Each of GenCorp's remaining subsidiaries was also required to adjust to the corporate downsizing. At DiversiTech, management implemented numerous cost-cutting measures, including a hiring freeze, suspension of all training seminars, a 25% reduction in travel expenses, a 50% reduction in overtime, and the termination of all temporary help. Despite these measures, management was still required to reduce the salaried payroll.

To accomplish this, management identified those positions which could be eliminated with the least disruption to the organization. In some cases, job functions were split and consolidated with other positions; in other cases, job functions were simply abolished.

At the time of the restructuring, Petitioner Richard S. Novitsky [DOB: 10-4-30] served as Manager of Ecology & Government Compliance. He had no subordinates assigned to him and he reported directly to the Latex Manufacturing Manager at the Mogadore, Ohio plant, H.E. Jewett. Mr. Jewett [DOB: 7-14-34], like Mr. Novitsky, has a background in environmental work.

The position of Manager for Ecology & Government Compliance was eliminated, since many of its environmental compliance functions were redundant of functions performed, or partially performed, in other positions. As a result, the residual duties of Manager for Ecology & Government Compliance were split-up and consolidated with four other existing positions:

Latex Manufacturing Manager—H.E. Jewett

Personnel Administration, OSHA/EEO—L.E. Gulka

Safety Inspector—T.C. Stokes

Senior Process Engineer—R.A. Newgent

Significantly, most of the duties were assumed by Messrs. Stokes, then age 57 [DOB: 11-5-29], and Newgent, then age 51 [DOB: 10-23-35]. Mr. Stokes is actually *older* than Mr. Novitsky, and Mr. Newgent is also a contemporary of Mr. Novitsky.

SUMMARY OF ARGUMENT

This Court has properly cautioned that statistics in employment discrimination cases must be utilized carefully in order to avoid penalizing employers for mere statistical patterns which are unconnected to any discriminatory acts. This is especially true in individual, disparate treatment cases such as the present one.

The Sixth Circuit made a careful, case-by-case analysis of the evidence and rendered a decision based on the specific facts before it. The Circuit court specifically rejected the broad, blunderbuss principle Petitioners espouse. To adopt Petitioners' proposed rule would inevitably force employers to conduct layoffs by strict age quotas.

The Sixth Circuit merely held that, on the specific facts of the eleven ADEA cases presented, the Petitioners' statistics did not, by themselves, create an issue of fact as to whether Respondents' reasons for its actions were pretextual. Petitioners' claim of a conflict among the Circuits is therefore false. The present cases, like those of the other Circuits, are each highly fact-specific and do not contradict each other on the applicable legal principles.

REASONS FOR DENYING THE WRIT

A. Certiorari Is Inappropriate Since The Sixth Circuit's Decision Is In Full Accord With The Teachings Of This Court.

This Court has consistently taken a balanced and reasonable approach to the use of statistics in employment discrimination cases. While the right statistics in the proper context can certainly be probative of discrimination, their probity must be examined on a case-by-case basis. Thus, for example, this Court has refused to credit statistics allegedly showing discrimination in hiring where the employer's work force is compared to the general population rather than to the relevant labor market. *Wards Cove Packing Co., Inc. v. Atonio*, _____ U.S. _____, 109 S. Ct. 2115 (1989).

Characteristically, Petitioners ignore the teaching of *Wards Cove*, just as they ignore this Court's seminal discussion of employment discrimination statistics in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). (Astonishingly, neither of these landmark decisions are even cited in the Petition for Writ of Certiorari.) In *Teamsters* the Court upheld the use of statistical evidence in discrimination cases, but warned:

> [S]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

Id., 431 U.S. at 340. Statistics are not magic talismans inevitably pointing toward discrimination; rather, as in *Wards Cove*, they often serve merely to disguise a partisan conclusion with an unwarranted scientific aura.

The reason for viewing statistics cautiously was forcefully stated in *Wards Cove*. The discrimination statutes, including the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*, prohibit discrimination against individuals on the basis of certain characteristics. They do not prohibit particular statistical patterns, nor do they require employers to perfectly match every personnel action (such as the reduction-in-force in the present case) to any particular demographic ideal. Otherwise,

> [t]he only practicable option for many employers would be to adopt ... quotas, insuring that no portion of his work force deviates ... from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII.

Wards Cove, _____ U.S. at _____, 109 S. Ct. at 2122. The rule Petitioners' espouse would inevitably lead to age quotas, since even when the plaintiff is *younger* than the retained employee (as in the case of Petitioners Barnes and Novitsky), Petitioners claim statistics alone would support a jury verdict in their favor.

The Sixth Circuit properly rejected such a ludicrous proposition, and applied the principle stated in *Teamsters*. First, the Sixth Circuit held that the statistical evidence presented by the Petitioners did establish a prima facie case, *i.e.*, a set of facts which, *if unexplained*, would permit an inference of discrimination. *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990), Petition for Writ of Certiorari at A16-A17. In *Teamsters*, this Court envisioned that statistics may perform precisely such a role. *Id.*, 431 U.S. at 339 n.20 (statistics may be probative of discrimination because *absent explanation* it is to be expected that over time a nondiscriminatory hiring policy will result in a workforce more or less representative of the racial makeup of the relevant labor market).

The Sixth Circuit then proceeded to the next analytical step in an employment discrimination case, and examined whether Respondents had a legitimate, nondiscriminatory reason for their action. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). The Sixth Circuit found that Respondents provided specific, detailed, legitimate, non-discriminatory reasons for selecting each of the Petitioners for layoff. *Barnes*, 896 F.2d at 1468, Petition for Writ of Certiorari at A22. [These reasons are summarized *supra* at pages 2-8.] Under the principles of *McDonnell Douglas*, the Petitioners' prima facie case was therefore rebutted and Respondents were entitled to summary judgment unless there was a genuine issue of material fact as to whether Respondents' stated reasons for the layoff decisions were mere pretexts for age discrimination.

Petitioners could have attempted to establish pretext either directly, by showing that the discriminatory reason was the true reason motivating the employer's conduct, or, indirectly, by showing that the employer's stated reason for its conduct is false. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). But instead of addressing the specific set of facts resulting in each Petitioner's layoff, Petitioners merely reiterated the same Division-wide statistics on which they relied for their prima facie case. The Sixth Circuit properly rejected this approach, and its decision is in perfect accord with the decisions of this Court.

B. Certiorari Is Inappropriate Since The Sixth Circuit's Decision Is Consistent With The Decisions Of The Other Circuits.

Significantly, the Sixth Circuit did *not* hold that statistical evidence can never establish pretext. Rather, it limited its analysis only to the facts of the present

case: "We are unwilling to hold that statistics could never form the basis for a rebuttal, but we do not believe that the statistics presented *in this case* provide an adequate response to the defendants' explanations." *Barnes*, 896 F.2d at 1468, Petition for Writ of Certiorari at A23 (footnote omitted; emphasis added).[2] Therefore, the Sixth Circuit's decision is in perfect accord with all of the cases Petitioners cite in their attempt to show a conflict among the Circuits. *See* cases cited in Petition for Writ of Certiorari at 14-15. Every case cited by Petitioners employs the same case-by-case analysis of statistics which this Court prescribed in *Teamsters* and which the Sixth Circuit employed in *Barnes*. For example, in *Freeman v. Package Machinery Co.*, 865 F.2d 1331 (1st Cir. 1988), the court did not adopt the *per se* rule that Petitioners espouse, that any particular statistical evidence is always competent to rebut a legitimate nondiscriminatory reason. Rather, the court stated plainly that "[t]he probative worth of statistical testimony must be evaluated in light of the methodology employed, the data available, and the factual mosaic unique to the case at hand." 865 F.2d at 1342 n.5.[3]

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[2] In this regard the Sixth Circuit is also in perfect accord with the Equal Employment Opportunity Commission, which filed an *amicus* brief below. In that Brief the EEOC noted that its support for the statistical argument in the present case applied only to the prima facie stage of analysis, since "the issues concerning pretext are largely factual in nature." Brief for the Equal Employment Opportunity Commission as *Amicus Curiae* at p. 10, n.7.

[3] Interestingly, Petitioners did not cite *Freeman* or any of the other cases allegedly in conflict with the Sixth Circuit in either their principal brief, reply brief or petition for rehearing when the present case was still before the Sixth Circuit.

The Sixth Circuit properly rejected the particular statistical evidence Petitioners proffered to show pretext because there is no showing of any specific causal relationship between the statistics and the individual decisions GenCorp and DiversiTech made with respect to each Petitioner. As the Sixth Circuit properly reasoned:

> By presenting evidence that each plaintiff was less qualified than others occupying comparable positions, the defendants have undercut the importance of the plaintiffs' statistical proof. This method of attacking a statistical prima facie case cannot be rebutted by reference to the statistics already presented since the statistics here do not tend to establish that age played a factor in any *particular* decision.

Barnes, 896 F.2d at 1469, Petition for Writ of Certiorari at A25 (footnote omitted; emphasis in original.) Petitioners' statistics merely asserted that, for example, GenCorp could have been expected to lay off 15 employees over the age of 48, and since 24 were actually laid off, discrimination may have been afoot. But the statistics said nothing about whether Petitioner Barnes, for instance, was included in the layoff for a legitimate reason or a discriminatory one. Yet the very purpose of the *Burdine* order of proof is to so narrow the issues as to require the plaintiff to focus on the *particular* facts of each case.

> If the defendant carries this burden of production [of a non-discriminatory reason], *the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity*. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to *frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext*.

Burdine, supra, 450 U.S. at 255-56 (emphasis added).

In the present case, Respondents have given detailed reasons for each decision they made. The individuals in each job function were evaluated and the persons deemed best suited for the new direction GenCorp was taking were retained. Petitioners, however, want to ignore these individual decisions and instead focus on lifeless, broad-brush statistics. Petitioners' statistics in effect provide a satellite-high overview of the Research Division and DiversiTech. To rebut the Petitioners' prima facie case, Respondents focused the camera in on each individual Petitioner, thus narrowing the inquiry to the "new level of specificity" required by *Burdine*. Not flattered by the picture thus revealed, Petitioners seek to avoid narrowing the issue, as *Burdine* mandates. The Sixth Circuit properly rejected Petitioners' argument as the self-serving effort it so clearly is.

Other Circuits besides the Sixth have followed *Burdine* in looking to the specific reasons as employer offers to rebut a statistical prima facie case. For example, in *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986), the court agreed that statistics showing a two in 1,000 probability that a discharge during a reduction-in-force was age neutral created a prima facie case. However, the court held that prima facie case was rebutted by the employer's specific reasons for selecting a specific plaintiff for layoff:

> Statistical evidence, while relevant to show motive, intent or purpose, is not determinative of an employer's reasons for the action taken against an individual grievant. [Citations omitted.] Especially in the context of age discrimination cases, in which there are factors tending to negate the probative value of such evidence, statistics might not be reliable to indicate an employer's compliance with the Act's proscriptions. . . . Even if there were

> reason to believe that the expert's opinion had been enough to establish a prima facie case of discrimination based on age, E-M presented reasonable factors other than age for the terminations to rebut this testimony.

804 F.2d at 1031.[4] Similarly, in *Stephen v. PGA Sheraton Resort, Ltd.*, 873 F.2d 276 (11th Cir. 1989), the plaintiff was held to have established a prima facie case of racial discrimination through statistics. However, judgment for the employer was affirmed because the employer's reason for discharging the individual plaintiff—inadequate language skills—was not logically rebutted by the statistics.

Exactly the same situation obtains in the present case. Petitioners' statistics, at best, only show that a statistically high number of older employees were included in the reduction-in-force. Neither the statistics nor any other evidence establishes that these particular Petitioners were discriminated against. The purpose of the *Burdine* process is to move the inquiry precisely to that step.

The unrebutted reasons for the individual decisions, are described in the statement of the case, p. 1 et seq., *supra*. Petitioners did not offer one scrap of evidence to suggest these reasons were pretextual. Rather, they were content to repeat their statistical prima facie case. Because none of the Respondents' non-discriminatory reasons for selecting these Petitioners for layoff have been challenged, the Sixth Circuit was correct to affirm the District Court's granting of summary judgment.

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[4] Despite *Moore*, Petitioners claim that the Eighth Circuit is one of the courts which is in conflict with the present case. Petition for Writ of Certiorari at 14-15. Petitioners clearly have the argument backwards, since *Moore* is in full accord with the Sixth Circuit's case-by-case approach to statistics.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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